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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DAWN M. THOMPSON et al.,

Plaintiffs and Appellants,

v.

BANKERS INSURANCE COMPANY et
al.,

Defendants and Respondents.

A132966

(San Francisco County
Super. Ct. No. CGC09495670)

Plaintiffs appeal from summary judgment in favor of defendants, Bankers Insurance Company, Bankers Insurance Group, and Bankers Financial Corporation (Bankers). The sole issue is whether a third party claim, resulting from an automobile accident, is covered under a commercial general liability (CGL) policy that purports to exclude coverage for automobile-related losses. We conclude that under applicable California decisional law and the insurance policy exclusion in question there is no coverage under the policy and therefore affirm.

I. BACKGROUND

Bankers' insured, Anthony Jao, owner of AJ's Hardwood Flooring, Inc. (collectively Jao), was insured under a CGL policy that excluded losses arising out of the use of an automobile (automobile exclusion). The automobile exclusion provides, in pertinent part, as follows: "This insurance does not apply to: [¶] . . . [¶] 'Bodily injury' . . . arising out of the ownership, maintenance, use or entrustment to others of

any . . . ‘auto’ . . . owned or operated by or rented or loaned to any Insured. Use includes operation and ‘loading or unloading.’ ”

On the afternoon of February 15, 2005, Jao was driving his pickup truck northbound on Highway 29 in Napa. It was raining that day and the pavement was wet. Jao had finished a flooring job and was taking rolls of carpet and carpet padding to the dump. However, not all of the rolls of carpet and padding made it to the dump. A witness who was driving on Highway 29 that afternoon saw a piece of carpet fly off the back of Jao’s truck. The witness followed Jao to the dump and informed him that he had lost a piece of carpet back on Highway 29. Jao replied, “ ‘Yeah, I know, my buddy did not tie it right.’ ”

Meanwhile, Dawn Thompson, who also was driving northbound on Highway 29 that afternoon, encountered “large rugs” that were blocking her lane. Unable to move into the next lane due to an 18-wheel truck traveling beside her, she came to a stop and was rear-ended by a white sports utility vehicle (SUV). The driver of the SUV explained that he had stopped behind Thompson, but another car came “flying over the hill going about 70 plus miles per hour” and rear-ended his vehicle. The driver said the impact of that collision pushed his SUV into Thompson’s vehicle.

At some point, the witness had returned to Highway 29 from the dump, where he saw that the multi-vehicle accident had occurred. Upon viewing the collision, the witness remained at the scene, figuring that Jao would return to get the carpet. The witness, however, saw Jao drive by the collision and continue on to the West American Bank Plaza in American Canyon. The witness then called the police and provided Jao’s license plate number and other identifying information.

The investigating officer concluded the accident was caused by Jao’s “spilling a load onto the roadway” in violation of Vehicle Code section 23114, subdivision (a)¹ and

¹ Vehicle Code section 23114, subdivision (a), provides, in relevant part, as follows: “a vehicle shall not be driven or moved on any highway unless the vehicle is so constructed, covered, or loaded as to prevent any of its contents or load . . . from dropping, shifting, leaking, blowing, spilling, or otherwise escaping from the vehicle.”

by his “failure to remove[] spilled material immediately” in violation of Vehicle Code section 23113, subdivision (a).² The officer opined that the collision could have been avoided had Jao cleared the roadway immediately after the spill.³

As a result of the collision, Thompson suffered serious personal injuries. Thompson sued Jao, as well as the two other drivers involved in the collision. In her personal injury complaint, Thompson alleged, among other things, that Jao negligently “put an unsecured roll of carpeting or other material, onto [his] truck, allowing it to spill onto the roadway.” She alleged that this conduct violated Vehicle Code section 23114 and, thus, constituted negligence per se. Thompson further alleged that Jao “failed to remove” the carpeting, “endangering other motorists,” and that this failure violated Vehicle Code section 23113, which also constituted negligence per se.

Jao tendered the claim to Bankers, which denied coverage based on the automobile exclusion. Thompson arbitrated her claims against Jao, and she was awarded \$929,700 in damages.

Following the arbitration award, Thompson, joined by Jao (hereafter plaintiffs)⁴, filed the instant action against Bankers, alleging, among other things, breach of contract and breach of the implied covenant of good faith and fair dealing. Plaintiffs also alleged

² Vehicle Code section 23113, subdivision (a) provides as follows: “Any person who drops, dumps, deposits, places, or throws, or causes or permits to be dropped, dumped, deposited, placed, or thrown, upon any highway or street any material described in Section 23112 or in subdivision (d) of Section 23114 shall immediately remove the material or cause the material to be removed. Vehicle Code section 23112, subdivision (a) provides, in pertinent part, as follows: “No person shall throw or deposit, nor shall the registered owner or the driver, if such owner is not then present in the vehicle, aid or abet in the throwing or depositing upon any highway . . . any substance likely to injure or damage traffic using the highway, or any noisome, nauseous, or offensive matter of any kind.”

³ There is no indication in the record regarding the amount of time that had elapsed from the time the carpet fell onto the roadway until the accident.

⁴ Where appropriate, we shall continue to refer to Thompson and Jao individually for purposes of clarity.

that Bankers had waived the right to assert the automobile exclusion and/or was estopped from relying on it.

Bankers moved for summary judgment, arguing that the underlying claim was within the ambit of the automobile exclusion and, therefore, not a covered risk. In opposition, plaintiffs argued, among other things, that Jao's failure to remove the carpet from the roadway was a concurrent cause of the accident that was independent of automobile use and, thus, not excluded under the automobile exclusion. Plaintiffs also claimed that Bankers failed to eliminate a triable issue of fact regarding their waiver/estoppel claim by failing to address this claim in its summary judgment motion.

The trial court granted the motion for summary judgment. In so ruling, the court found that the "[u]ndisputed evidence shows that the accident arose from the use of the car." The court further determined that plaintiffs' "estoppel/waiver allegation under the breach of contract cause of action has no merit."

Following the entry of judgment, plaintiffs moved for a new trial on the ground of legal error. As before, they argued that the failure to remove the carpet constituted a non-automobile-related concurrent cause of the accident, which was independent of Jao's use of his truck. In support of their position, they cited two non-California cases, *Houser v. Gilbert* (N.D. 1986) 389 N.W.2d 626 (*Houser*) and *Estate of Pennington ex rel. Pennington v. Wolfe* (D.Kan. 2003) 262 F.Supp.2d 1254 (*Estate of Pennington*). Plaintiffs conceded that although these cases were not binding on the trial court, they were nevertheless persuasive authority supporting plaintiffs' contention that the failure to remove the carpet was a non-automobile-related cause that was not barred by the automobile exclusion.

The trial court issued a tentative ruling granting the motion for new trial, expressly stating that it found the *Houser, supra*, 389 N.W.2d 626 and *Estate of Pennington, supra*, 262 F.Supp.2d 1254 cases "persuasive in support[ing] . . . plaintiffs' position that the failure to remove an obstruction from a roadway is independent from the operation of the vehicle" However, following the hearing on the motion, the trial court issued a

written order denying a new trial, stating it “cannot follow out of state court interpretation of like insurance clauses to find that its earlier ruling was an error in law”

The instant appeal followed.

II. DISCUSSION

A. *Standard of Review*

We review the trial court’s decision granting summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) After identifying the issues framed by the pleadings, we determine whether the moving party demonstrated both the absence of a material factual dispute and a right to judgment. (*State Farm Fire & Casualty Co. v. Salas* (1990) 222 Cal.App.3d 268, 270.) In the case before us, the material facts appear undisputed. This case turns on the purely legal question of the policy’s exclusion to these undisputed facts. (*Id.* at pp. 270-271.) “[A] liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. [Citation.]” (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081; accord, *Ortega Rock Quarry v. Golden Eagle Ins. Corp.* (2006) 141 Cal.App.4th 969, 977.) “The insurer is entitled to summary adjudication that no potential for indemnity exists and thus no duty to defend exists if the evidence establishes as a matter of law that there is no coverage. [Citation.]” (*Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 414.) “An insurer may select the risks it will insure and those it will not, and a clear exclusion will be respected.” (*Ibid.*) “However, an exclusion or limitation on coverage must be clearly stated and will be strictly construed against the insurer. (*Ibid.*) Well-settled rules of contract interpretation govern interpretation of an insurance contract. (*Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 322.)

B. *The Policy Does Not Cover the Underlying Personal Injuries*

As mentioned, the policy contains a provision that excludes coverage for “[b]odily injury’ . . . arising out of the ownership, maintenance, use or entrustment to others of any . . . ‘auto’ . . . owned or operated by or rented or loaned to any Insured. Use includes

operation and ‘loading or unloading.’ ” The phrase “ ‘arising out’ ” of is broad, and is ordinarily understood to mean “ ‘incident to, or having connection with.’ ” (*Hartford Accident & Indem. Co. v. Civil Service Employees Ins. Co.* (1973) 33 Cal.App.3d 26, 32; *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 100-101 (*Partridge*) [phrase “ ‘arising out of the use’ ” of vehicle encompasses injuries “bearing almost any causal relation with the vehicle”].)

Plaintiffs cannot seriously dispute that the underlying action “ ‘arises out’ ” of the use of a vehicle owned by an insured within the meaning of the policy. Instead, they contend that the “concurrent cause doctrine” creates the possibility of coverage notwithstanding the auto exception. In essence, plaintiffs contend that the underlying action also arises out of Jao’s negligent failure to remove the carpet from the roadway, and that such negligence constitutes an independent concurrent cause of the accident.

The seminal case on concurrent causes is *Partridge, supra*, 10 Cal.3d 94. There, the insured negligently modified a gun’s trigger mechanism by filing it to lighten the trigger pull, creating a “ ‘hair trigger.’ ” (*Id.* at p. 97.) One evening the insured went hunting jackrabbits, using the modified gun to shoot at them out the window of his vehicle. (*Id.* at p. 98.) Once the insured spotted a jackrabbit, he negligently drove off the paved road and onto the adjacent rough terrain. (*Ibid.*) When the vehicle hit a bump, the gun discharged, shooting and paralyzing the insured’s passenger. (*Ibid.*)

The legal issue in *Partridge* was whether, in addition to the unquestioned coverage under an automobile policy for the use of a vehicle constituting a proximate cause of the accident, a homeowner’s policy with its exclusion of coverage for injuries “ ‘arising out of the . . . use . . . of a motor vehicle’ ” could also cover the liability. (*Partridge, supra*, 10 Cal.3d at p. 101.) Rejecting the insurer’s contention that the policies were mutually exclusive, the court concluded that because the insured had been negligent both in his driving of the vehicle and in modifying the trigger of the gun to make it fire more easily, coverage was provided by both policies. (*Id.* at pp. 101, 104-105.) The court reasoned that “although the accident occurred in a vehicle, the insured’s negligent modification of the gun suffices, in itself, to render him fully liable for the resulting injuries . . . ;

inasmuch as the liability of the insured arises from his non-auto-related conduct, and exists independently of any 'use' of his car, we believe the homeowner's policy covers that liability." (*Id.* at p. 103, italics added.) "Here, . . . an insured risk (the modification of the gun) combined with an excluded risk (the negligent use of the car) to produce the ultimate injury. Although there may be some question whether either of the two causes in the instant can be characterized as *the* 'prime,' 'moving' or 'efficient' cause of the accident[,] we believe that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply *a* concurrent proximate cause of the injuries. That multiple causes may have effectuated the loss does not negate any single cause; that multiple acts concurred in the infliction of injury does not nullify any single contributory act." (*Id.* at pp. 102-105, fns. omitted.)

Subsequent cases have construed the above italicized language to require that "in order for *Partridge* to apply there must be two negligent acts or omissions of the insured, one of which, *independently of the excluded cause*, renders the insured liable for the resulting injuries. [Citations.]" (*Daggs v. Foremost Ins. Co.* (1983) 148 Cal.App.3d 726, 730, italics added.) "Courts following *Partridge* have made it clear that its holding only applies to 'multiple causes that operated totally independently of one another.' " (*Medill v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819, 835.)

Plaintiffs maintain that Jao's failure to remove the carpet from the roadway was a non-automobile-related, independent cause of the accident. Citing *Partridge*, plaintiffs argue that coverage cannot be defeated in the instant case simply because the failure to remove the carpet combined with the separate, excluded risk (improper loading) to cause the accident. (See *Partridge, supra*, 10 Cal.3d at p. 97.) Even so, we conclude that plaintiffs have not identified a potential cause of the accident not subject to the automobile exclusion of Bankers' policy, because Jao's failure to remove the carpet does not constitute a concurrent proximate cause of injury under *Partridge* and its progeny.

Although the parties discuss numerous cases that have analyzed *Partridge*, 10 Cal.3d 94, our analysis need not be prolonged. In *Partridge*, the efficient proximate cause was the modified gun because it could cause injury regardless of where it was fired.

The insured's vehicle was merely the place where the gun happened to discharge, but it could just as easily have discharged in a house or on the street. Here, Jao's vehicle was indispensable to the accident. The accident might have occurred without Jao's failure to remove the carpet, but the accident could not have occurred without the failure to tie down the load properly. For example, as soon as the carpet fell onto the roadway, motorists behind Jao's truck could have immediately run into the carpet, swerved to avoid it, or slammed on their brakes, any of which had the potential to cause an accident. However, without the negligent loading of the vehicle, the carpet would never have been on the roadway in the first place. In other words, the negligent loading of the truck set in motion the other causes of the accident, namely the carpet falling onto the roadway, and Jao's subsequent failure to remove it. (See *Sabella v. Wisler* (1963) 59 Cal.2d 21, 31.) Plaintiffs, however, attempt to disassociate the negligent loading of the truck from the accident, claiming that the "carpet could have been deposited on the highway in any number of ways unrelated to the use of an automobile" (boldface omitted) and that, irrespective of how the carpet ended up on the roadway, Jao's failure to remove it was an independent negligent act under Vehicle Code section 23113.

Plaintiffs' hypothetical musings notwithstanding, under applicable California law, the accident in this case "cannot be disassociated from the use of the vehicle itself 'Conduct which is dependent upon and related to the use of the vehicle cannot be deemed an independent act' [Citation.]" (*Belmonte v. Employers Ins. Co* (2000) 83 Cal.App.4th 430, 434 [niece's use of van constituted single proximate cause of injury]; see also *Prince v. United Nat. Ins. Co.*, (2006) 142 Cal.App.4th 233, 244-245 [negligence in leaving children in hot car " 'simply cannot be disassociated from the use of the vehicle.' [Citation.]"]; *Providence Washington Ins. Co. v. Valley Forge Ins. Co.* (1996) 42 Cal.App.4th 1194, 1203 [negligent use of tire sealant nothing more than excluded risk of negligent automobile use or maintenance]; *Gurrola v. Great Southwest Ins. Co.* (1993) 17 Cal.App.4th 65, 68 [only way passenger and other driver could have been exposed to negligent welding was through operation of vehicle]; *State Farm Fire & Casualty Co. v. Salas*, *supra*, 222 Cal.App.3d at pp. 276-278 [failure to warn about tire's

flammability was “inextricably linked” to vehicle]; *National American Ins. Co. v. Coburn* (1989) 209 Cal.App.3d 914, 921-922 [negligent supervision of children did not exist independently of use and loading of vehicle]; *Safeco Ins. Co. v. Gilstrap* (1983) 141 Cal.App.3d 524, 528 [negligent entrustment so dependent upon use of car that it comes within automobile exclusion]; *Allstate Ins. Co. v. Jones* (1983) 139 Cal.App.3d 271, 277 [failure to properly load rebar implicitly referred to failure to do so on truck]; *National Indemnity Co. v. Farmers Home Mutual Ins. Co.* (1979) 95 Cal.App.3d 102, 108-109 [negligent failure to supervise and control child during unloading of vehicle not independent of vehicle use; injury involved no “instrumentality other than the vehicle itself”]; *State Farm Fire & Cas. Co. v. Camara* (1976) 63 Cal.App.3d 48, 54-55 [design and construction of dune buggy not sole cause of accident, but such design was dependent upon vehicle use itself]; *United Services Automobile Assn. v. United States Fire Ins. Co.* (1973) 36 Cal.App.3d 765, 770-771 [insured’s attempt to start friend’s car with gasoline can though “peripheral” activity not wholly disassociated from and independent of vehicle use].)

While it may be theoretically possible for a carpet to be deposited on a roadway without the use of a vehicle, the fact remains that in the instant case the carpet came to be on the roadway *because* of Jao’s vehicle use. Plaintiffs cannot break the chain of causation in this case by merely hypothesizing about other possible ways that the carpet could have come to be on the roadway. Similarly, to the extent that Jao’s failure to remove the carpet violated Vehicle Code section 23113, this statutory violation does not change the fact that the carpet would not have been in the roadway *but for* the negligent loading of the vehicle. Turning to plaintiffs’ proffered hypothetical, wherein the carpet is loaded and transported by a friend, with Jao riding as a passenger, plaintiffs acknowledge that “[i]f the carpet fell onto the roadway en route, the friend would be liable for negligent loading and use of his truck, but [] Jao would be liable if he failed to remove the carpet that belonged to him and was being transported for his benefit.” Thus, even plaintiffs’ hypothetical underscores that the failure to remove the carpet cannot be disassociated from the loading of the vehicle itself. In other words, plaintiffs have

contrived a non-automobile-related independent cause where there is none. The proposed insured risk of failing to remove the carpet is really nothing more than the insured's negligent loading of the vehicle.

Contrary to plaintiffs' suggestions, nothing in *Partridge* compels a finding of coverage in this case. Plaintiffs' argument turns on the following passage from *Partridge*: "Whenever . . . a non-auto risk is a proximate cause of an injury, liability attaches to the insured, and coverage for such liability should naturally follow. Coverage cannot be defeated simply because a separate excluded risk constitutes an additional cause of the injury." (*Partridge, supra*, 10 Cal.3d at p. 97.) Here, the proximate cause of the injury *is* automobile-related (the negligent loading) and, thereby, excluded from coverage. Plaintiffs cannot manufacture coverage for the resulting accident by relying on the fact that a non-auto risk (failure to remove the carpet) was an additional cause of the injury. Unlike in *Partridge*, the insured's liability in this case did not arise from an act separate and independent from the "use" of the vehicle itself.

The non-California cases relied on by plaintiffs do not compel a contrary conclusion. (See *Estate of Pennington, supra*, 262 F.Supp.2d at pp. 1259-1260 [under Kansas law negligent failure to remove equipment from roadway was non-vehicle-related act independent of negligent failure to secure equipment in truck]; *Houser, supra*, 389 N.W.2d at pp. 630-631 [use of vehicle not sole cause of accident; independent failure to remove mud from roadway and failure to warn].) "Although non-California cases may be instructive in some instances, the interpretation of the term 'use' as it relates to an automobile coverage provision or exclusion is not an issue that can be decided outside the context of applicable in-state precedent." (*Prince v. United Nat. Ins. Co., supra*, 142 Cal.App.4th at p. 242.) Indeed, "California courts take an expansive view of the term and are disinclined to find overlapping coverage. [Citation.] Courts outside the jurisdiction do not necessarily follow the same approach." (*Ibid.*, fn. omitted.)

Equally unavailing is plaintiffs' reliance on various inapposite California cases. In each of those cases, the injuries arose out of separate and independent acts of negligence, unrelated to the use of the automobile. (See *Safeco Ins. Co. of America v. Parks* (2009)

170 Cal.App.4th 992, 1012 [vehicle use not “ ‘predominating cause’ ” of injuries; negligence in leaving passenger on side of the road was an independent source of liability that would exist regardless of automobile use]; *Ohio Casualty Ins. Co. v. Hartford Accident & Indemnity Co.* (1983) 148 Cal.App.3d 641, 647 [negligent supervision of teen swimmer was separate and independent cause of accident; no relationship between boat and acts causing injury, rather mere fortuity that acts occurred on boat]; *State Farm Fire & Cas. Co. v. Kohl* (1982) 131 Cal.App.3d 1031, 1039 [truck driver’s postaccident conduct of dragging victim from the road was independent nonvehicular conduct that replaced or concurred with vehicle use as a cause of the additional injury].) Here, Jao’s negligence in loading the carpet simply “cannot be disassociated from the use of the vehicle.” (*National American Ins. Co. v. Coburn, supra*, 209 Cal.App.3d at pp. 920-921.) It was his failure to properly secure the carpet that caused the carpet to be in the roadway. Because that use was an excluded peril under the Bankers CGL policy, there was no coverage under that policy.

C. Bankers Did Not Waive its Right to Assert the Auto Exception

Plaintiffs assert that summary judgment was precluded because Bankers failed to address the allegation in the complaint that it had waived the right to assert the automobile exclusion. Frankly, this contention borders on being a frivolous claim. There is nothing in the record suggesting that Bankers has ever taken a contrary position with respect to the applicability of the automobile exclusion in the instant case. Moreover, Bankers expressly referred to and relied on the automobile exclusion in its denial letter. Accordingly, there is no basis to reverse the summary judgment on this purported claim of waiver/estoppel.

III. DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

Sepulveda, J.*

We concur:

Reardon, Acting P.J.

Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.